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District Court

JUL 31 2008

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

LI FENFEN,

Plaintiff,

vs.

SEAHORSE INC. SAIPAN,

Defendant.

CIVIL CASE NO. 07-0033

**OPPOSITION TO PLAINTIFF'S
MOTION TO DE-BIFURCATE TRIAL
AND CROSS MOTION TO DISMISS
SECOND CLAIM FOR RELIEF**

TIME: 8:30 A.M.

DATE: AUG. 28, 2008

JUDGE: MUNSON

Seahorse Inc. Saipan responds to Plaintiff's request for this Court to reconsider its Order of May 2, 2008 and further requests the Court to grant judgment on the pleadings to Seahorse on Plaintiff's Second Claim for Relief.

Background

By order of March 25, 2008, the Court proposed a bifurcation of the issues in this case, and directed the parties to submit memoranda on the subject. The Court required the parties to set out their issues of "controlling law." Order at 2.¹

¹ "IT IS ORDERED that defendant shall submit to the court by Friday, April 11, 2008, a memorandum of law setting out what they believe to be the controlling law. Plaintiff shall have until Friday, April 25, 2008, to respond with her own memorandum of controlling law."

1 Seahorse submitted a memorandum that generally supported the Court's proposal.
2 See Seahorse, Inc. Saipan Response to Order of March 25, 2008 (filed April 11, 2008).

3
4 The Plaintiff Li Fenfen submitted a memorandum that questioned the application of
5 the Limitation of Liability Act to a jet ski operating in the Saipan lagoon, but otherwise
6 "Plaintiff is in general agreement with the principles of law stated by the Court in its
7 March 25 Order, and by Defendant in its April 11 brief." Plaintiff's Responsive
8 Memorandum, at 8 (filed April 25, 2008). The Plaintiff did not contest the Court's
9 bifurcation proposal, which provided for trial by the court:
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11 IT IS FURTHER ORDERED that a status conference will be held in this
12 matter on Friday, May 2, 2008, at 9:30 a.m. to discuss with the parties the
13 court's proposal to bifurcate this matter. It is the court's intention to exercise
14 its discretion under Fed.R.Civ.P. 42(a) and order a separate trial for the
15 limited purpose of resolving only defendant's Limitation of Liability Act
claim. In this separate trial, the parties will address and the court will
decide:

- 16 1. What acts of negligence, if any, caused the accident, and
17 2. Whether defendant had knowledge of the events that caused the accident.

18 ...

19 If defendant cannot prove that it was without privity or knowledge of the
20 negligent acts which caused the accident, it may not avail itself of the
21 Limitations of Liability Act and the lawsuit will continue to the damages
phase.

22 March 25, 2008 Order at 2, 3-4.

23
24 After the May 2 conference, the Court issued its revised scheduling order which
25 provides for the bifurcation. See Case Management Scheduling Order Re: Negligence and
26 Privity, May 2, 2008. It is that Order for which Plaintiff seeks re-consideration.

1 This response opposes the re-consideration and also requests the Court to rule in
2 Plaintiff's favor on the Second Claim for Relief, a claim under the CNMI's Consumer
3 Protection Act. That claim conflicts with the maritime nature of the incident and cannot be
4 sustained.
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6 Argument

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8 I. Plaintiff Waived any Right to a Jury Trial

9 Plaintiff, and the defendant to the extent applicable, waived any right to a jury trial
10 by failing to contest and even agreeing with the Court's proposed order of a court trial. *In*
11 *re City of Philadelphia Litigation*, 158 F.3d 723, 726 (3rd Cir. 1998) (A party waives his
12 right to a jury trial under Rule 39(a) not only by stipulation, but also by failing to object to
13 a court order); *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d
14 946, 949 (10th Cir. 1978) (waived in open court its right to a jury trial). No formal waiver
15 is required. Rule 39(a), F. R. Civ. P., has been interpreted broadly so as to encompass
16 orders entered by the court and not objected to; statements by the judge on the record that
17 are not objected to; and briefs arguing that the judge can decide certain matters as a legal
18 question. *See Lovelace v. Dall*, 820 F.2d 223, 227 (7th Cir. 1987) (cases cited therein). *See*
19 *generally White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (*en banc*) (eliminating
20 formalistic approach to Rule 39(a) waiver).
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24 Not only did the Plaintiff specifically agree with the Court's proposed bifurcated
25 procedure with a court trial, the Plaintiff did not raise any objection to the scheduling order
26 within the 14 days usually allotted for re-consideration. Instead, after liability discovery
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1 under the bi-furcated procedure had been completed, the Plaintiff changed her tune as to
2 who should decide liability and privilege and knowledge.

3
4 Once waived, the waiver stands unless the Court grants relief for extraordinary
5 reasons. Inadvertent or mistaken waivers do not entitle a litigant to relief under Rule
6 39(b). *See, e.g., Zivkovic, 302 F.3d at 1086; Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins.*
7 *Ltd., 239 F.3d 1000, 1002-03 (9th Cir. 2001); Lewis v. Time Inc., 710 F.2d 549, 556-57*
8 *(9th Cir. 1983).* In order to grant relief, something beyond mere inadvertence must be
9 shown. *Mardesich v. Marciel, 538 F.2d 848, 849 (9th Cir. 1976).*

11 In her moving papers, Plaintiff has shown no reason, much less one beyond mere
12 advertence. A change of mind with respect to what the law is and what fact finder she
13 might obtain more favorable relief does not equate to a circumstance more than “mere
14 inadvertence.” She intentionally took a path, and now thinks better of it. That behavior
15 does not justify this Court’s exercising its discretion in favor of her current views.
16

17 II. The Court Has the Discretion in How to Structure the Trial

19 Even were Plaintiff entitled to a jury trial, she has not shown that the Court’s
20 bifurcation deprives of her interest compared to the interest of the defendant in limiting its
21 liability.
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23 For maritime claims, there has always been a tension between the Limitation Act
24 and the savings to suitor clause, 28 U.S. C. § 1331(1).² *In Matter of Complaint of Boy*
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27 ² “The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
28 (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

1 *Scouts of America*, 1997 WL 68570, 2 (N.D.Cal. 1997).

2 The Limitation Act provides a framework for litigating all issues arising from a
3 maritime incident; “[o]therwise the purpose of the Act, i.e., limitation of the owner's
4 liability, might be frustrated.” *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151, 77 S. Ct.
5 1269, 1272 (U.S.). In addition, a potential for claims for attorneys' fees or costs against a
6 shipowner by a claimant “creates a multiple claimant situation necessitating a *concursum*.”
7 *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1040 (11th Cir. 1996) (citations
8 omitted). The Limitation Act permits the ship-owner to have all claims against him
9 brought into concourse in an admiralty tribunal. *Maryland Cas. Co. v. Cushing*, 347 U.S.
10 409, 414, 74 S. Ct. 608, 611 (1954) (plurality).

11 On the other hand, the saving to suitor clause protects common law remedies, even
12 jury trials, in the forum of claimants' choice. *In Matter of Complaint of Boy Scouts of*
13 *America*, 1997 WL 68570, 2 (N.D.Cal.) (N.D. Cal. 1997).

14 The courts that have dealt with the tension between the two acts require the
15 claimant seeking a jury trial prior to or concurrent with the limitation proceeding to enter
16 into stipulations to protect the owner's statutory right to limit liability. *Anderson v. Nadon*,
17 360 F.2d 53, 57 (9th Cir. 1966) (“it is generally held that when there are a multiplicity of
18 claims, and they exceed the limitation fund as asserted by the owner, the district court
19 should adjudicate the entire case, restraining independent state damage actions”); *Newton*
20 *v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983) (a single “claimant must: (1) stipulate that
21 the value of the limitation fund equals the combined value of the vessel and its cargo; (2)
22 waive the right to claim res judicata based on any judgment rendered against the vessel
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1 owner outside of the limitation proceedings; and (3) concede the district court's exclusive
2 jurisdiction to determine limitation of liability issues"). Otherwise, while the limitation
3 action is pending, there is no right to trial by jury. If and when limitation is denied, the
4 Court can revisit the jury demand issues. *In re Ingram Barge Co.* 2006 WL 5377855, 1
5 (E.D.La. 2006)

7 How to proceed is discretionary with the Court. With the appropriate stipulations,
8 the *Newton* court opined that it saw "no reason why both actions may not be tried at the
9 same time-the Jones Act claim by a jury and the limitation issue by the court" or "stay the
10 limitation proceeding and try the liability issue first, thus preserving the possibility that a
11 jury will find no liability or award less than the limitation fund and thereby moot the
12 limitation proceeding." *Supra*, 718 F.2d at 963-964 n. 5.

15 Here, Plaintiff has offered no stipulation with respect to the multiple claims, the
16 value of the limitation fund, or the lack of *res judicata* effects by a jury, – that is,
17 preserving for the Court the exclusive right to try the limitation issues. *See In re*
18 *Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1017-1018 (9th Cir. 2000)
19 ("Matson satisfied two of these requirements, namely, he waived the *res judicata* effects of
20 any intervening state court judgment, and conceded the district court's exclusive
21 jurisdiction over all questions concerning the right to limitation").³

26 ³ "Claimants have stipulated that: (1) XPI has the right to litigate the issue of whether it is
27 entitled to exoneration or limitation of liability under the Limitation Act in this court, and this
28 Court has exclusive jurisdiction to determine said issues. ... and further consent to waive the
defense of issue preclusion with respect to all matters reserved for determination by this court." *In*
re X-Treme Parasail, Inc., 2006 WL 4701815, 3 (D.Hawaii 2006).

1 The Plaintiff cites the *Fitzgerald* case for the proposition that it is entitled to a jury
2 on the limitations issues, which is exaltedly the opposite to the stipulations required by the
3 case law. In the *Fitzgerald* case, the Supreme Court fashioned controlling procedural rules
4 for admiralty law and instructed District Courts in how to proceed under certain maritime
5 claims that include a Jones Act claim that must be tried to a jury. *Fitzgerald v. U. S. Lines*
6 *Co.*, 374 U.S. 16, 20-21, 83 S. Ct. 1646, 1650 (1963) (Nor does any statute of Congress or
7 Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. Article III of
8 the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases,
9 and, since that time, the Congress has largely left to this Court the responsibility for
10 fashioning the controlling rules of admiralty law. This Court has long recognized its power
11 and responsibility in this area and has exercised that power where necessary to do so”).⁴
12 Thus, it is not surprising that in *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir.
13 1997), the Court required a jury trial on four plaintiff claims, three of which allowed for
14 jury trial. Although the Ninth Circuit reached the same result on a law counterclaim in
15 *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026
16 (9th Cir. 1991), the split of authority on the issue shows that the case is confined to the
17 circumstances. *Concordia Co., Inc. v. Panek*, 115 F.3d 67, 71 (1st Cir. 1997)
18 (documenting split of authority whether plaintiff's choice to proceed in admiralty deprives
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25 ⁴ “Plaintiff argues that the Supreme Court's decision in *Fitzgerald v. United States Lines*
26 *Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) created a ‘quasi-constitutional’ right to a
27 jury trial under the Seventh Amendment for Jones Act plaintiffs and defendants. The argument
28 lacks merit. In *Fitzgerald*, the Court held that a plaintiff's Jones Act right to a jury trial also could
extend to a plaintiff's non-Jones Act admiralty claims. The Court explained that while ‘the Seventh
Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other
provision of the Constitution forbids them.’ *Id.* at 20, 83 S. Ct. at 1650.” *Craig v. Atlantic*
Richfield Co. 19 F.3d 472, 476 n. 2 (9th Cir. 1994).

1 defendants of law claims before a jury). As shown, the *Fitzgerald*, *Ghotra* and *Wilmington*
2 *Trust* cases have not impacted how the courts deal with the shipowner's right to an
3 admiralty limitation proceeding.
4

5 Courts have not followed the holding of *Doughty v. Nebel Towing, Inc.*, 270 F.
6 Supp. 957 (E.D. La. 1967), which is cited by Plaintiff for the proposition that *Fitzgerald*
7 requires a jury trial on the same issues of her claims that are also within the admiralty,
8 limitation proceeding. Other Louisiana courts have not followed it, and Plaintiff has not
9 cited to any circuit court that has adopted the ruling from the 1967 *Doughty* decision. See
10 *In re Ingram Barge Co.*, 2006 WL 5377855, 1 (E.D.La. 2006) (jury trials are generally not
11 available in limitation of liability actions; "if the limitation is denied, the claimants may
12 elect to proceed before a jury with other actions") (citations omitted); *Arnold v. Port*
13 *Arthur Towing Co.*, 1988 WL 44473, 1 (E.D.La. 1988) ("the motion of the defendant to
14 strike the plaintiff's jury demand is DENIED except insofar as the Court must decide all
15 factual issues affecting the defendant's defense of limitation of liability");
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18 In conclusion, at this point, Plaintiff has not shown any compelling reason for this
19 Court to alter the procedure it adopted with the concurrence of the Plaintiff and the
20 Defendant. Were the Court to alter the procedure as requested by Plaintiff, Plaintiff will
21 be required to enter into stipulations to protect the limitation of liability.⁵
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27 ⁵ Seahorse notes that the CNMI Consumer Protection Act (Plaintiff's second claim for
28 relief) did not exist at the time of the common law and Plaintiff would have no right to a jury trial
on the claim.

1 III. Plaintiff's Second Claim for Relief Should be Decided in favor of Seahorse

2 Plaintiff's second claim is a CNMI law claim based upon the CNMI's Consumer
3 Protection Act, 4 CMC §§ 5101 *et seq.*. She claims actual damages, liquidated damages
4 and attorney's fee under Section 5112(a) of the Act.
5

6 This claim is antithetical to maritime law. First, the CNMI's consumer protection
7 Act is a hodgepodge of ill-defended behavioral requirements for landlubber merchants, all
8 of which carry the rubric of "unfair competition." *See* 4 CMC §§ 5104(h)⁶ and 5105. In
9 order to prove an act of unfair competition, it is not necessary to show harm to a consumer
10 or the presence of competition. 4 CMC § 5108. Any person aggrieved is entitled to such
11 legal or equitable relief as the court may order. In addition to actual damages, the court
12 shall award liquidated damages in an amount equal to the actual damages in cases of
13 willful violations, and shall award costs and reasonable attorney's fees if the plaintiff
14 prevails. 4 CMC § 5112.
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17 In the context of a maritime incident, as here, federal courts that have considered
18 consumer protection statutes or statutes with attorney fees consistently determine that the
19 statutes conflict with general maritime law and are, therefore, preempted. *See DeRossi v.*
20 *Nat'l Loss Mgmt.*, 328 F.Supp.2d 283, 288-89 (D.Conn.2004) (concluding that admiralty
21 law preempts a claim under the Connecticut Unfair Trade Practices Act because "the
22 damages provisions ... regarding attorney's fees and punitive damages are not consistent
23 with the standards established in admiralty law"); *Stires v. Carnival Corp.*, 243 F.Supp.2d
24 1313, 1321-23 (M.D.Fla.2002) (dismissing claim under the FDUTPA, in an admiralty
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28 ⁶ "Unfair competition" means an unlawful, unfair or fraudulent business practice and unfair, untrue or misleading advertising and any activity prohibited in 4 CMC § 5105.

1 action, for failure to sufficiently plead damages, and striking request for punitive damages
2 and attorney's fees); *Norwalk Cove Marina, Inc. v. S/V Odysseus*, 90 F.Supp.2d 190, 192-
3 93 (D.Conn.2000) (dismissing claim under the Connecticut Unfair Trade Practices Act,
4 concluding that the statute conflicts with admiralty law because it “allows for the award of
5 attorneys fees and punitive damages without meeting the standards established for such
6 awards in admiralty law”), *aff’d*, 64 Fed.Appx. 319, 320 (2d Cir.2003); *Delta Marine, Inc.*
7 *v. Whaley*, 813 F.Supp. 414, 416-17 (E.D.N.C.1993) (concluding that the North Carolina
8 Unfair and Deceptive Trade Practices Act was preempted by admiralty law); *Geftman v.*
9 *Boat Owners Ass’n of the United States*, No. C/A 2:02-1461-18, 2003 WL 23333312, at
10 *1-5 (D.S.C. Dec. 2, 2003) (concluding that the South Carolina Unfair Trade Practices Act
11 was preempted by admiralty law); *cf. also Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360,
12 363-67 (5th Cir.1995) (concluding that the Texas Deceptive Trade Practices Act was
13 preempted by the Longshore and Harbor Workers' Compensation Act); *Southworth Mach.*
14 *Co. v. F/V Corey Pride*, 994 F.2d 37, 40-42 (1st Cir.1993) (concluding that attorney's fees
15 provision in the Massachusetts Consumer Protection Act could not be applied in the case
16 because it was inconsistent with admiralty law); *Garan Inc. v. M/V Aivik*, 907 F.Supp. 397,
17 398-401 (S.D.Fla.1995) (concluding that the Florida offer-of-judgment statute was
18 preempted by admiralty law because it permitted a party to recover attorney's fees);
19 *Tarnawski v. Schenker, Inc.*, No. C02-5659 FDB, 2003 WL 22721987, at *4 (W.D.Wash.
20 May 6, 2003) (concluding, *inter alia*, that the Washington Consumer Protection Act was
21 preempted by the Carriage of Goods by Sea Act).

1 It is settled doctrine that a state law that conflicts with established maritime law or
2 federal statute will not be given effect. *Churchill v. F/V Fjord*, 857 F.2d 571, 576 (9th Cir.
3 1988). “[T]he smooth flow of maritime commerce is promoted when all vessel operators
4 are subject to the same duties and liabilities.” *Id.* at 576, quoting *Foremost Ins. Co. v.*
5 *Richardson*, 457 U.S. 668, 676, 102 S.Ct. 2654, 2659 (1982).
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7 Unlike the CNMI’s Consumer Protection Statute, maritime law applies the
8 “American Rule” as to attorney’s fees. *Gradmann & Holler GmbH v. Continental Lines,*
9 *S.A.*, 679 F.2d 272, 273-74 (1st Cir.1982). Therefore, the Court has discretion to award
10 attorneys fees upon a showing that opposing counsel has commenced or conducted an
11 action in bad faith, vexatiously, wantonly or for oppressive reasons. *See F.D. Rich Co. v.*
12 *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 40 L.Ed.2d
13 703 (1974). By contrast, the CNMI statute permits attorney fees merely for prevailing. 4
14 CMC § 5112.
15

16 For punitive damages, the CNMI Act permits liquidated damages in a set amount
17 upon a showing of a *willful* act of unfair competition. Federal maritime law has no
18 liquidated damages. However, under federal maritime law, punitive damages may be
19 available for conduct that manifests reckless or callous disregard for the rights of others or
20 for conduct which shows gross negligence or actual malice or criminal indifference. *Isham*
21 *v. Padi Worldwide Corp.*, 2007 WL 2460776, 16 (D. Hawai‘I 2007) (citation omitted).
22 The evaluation is directed toward the intent or neglect of the defendant toward the
23 purported victim; it is not an evaluation of unfairness or competition. *See Kahumoku v.*
24 *Titan Maritime, LLC*, 486 F.Supp.2d 1144, 1153 (D. Hawai‘I 2007) (“with gross
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1 negligence, manifest recklessness, callous disregard, or criminal indifference to the
2 Plaintiff's safety or well-being"). Further, whether punitive damages are available to a
3 passenger remains in doubt.⁷
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5 The CNMI Consumer Protection Act also conflicts with the maritime law
6 substantively. Seahorse owes a duty of reasonable care to those aboard the vessel who are
7 not crew members. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625,
8 630, 79 S.Ct. 406, 409-10, 3 L.Ed.2d 550 (1959). In *Kermarec*, the Supreme Court held
9 that "the owner of a ship in navigable waters owes to all who are on board for purposes not
10 inimical to his legitimate interests the duty of exercising reasonable care under the
11 circumstances of each case." *Id.* at 632, 79 S.Ct. at 410; accord *Morton v. De Oliveira*, 984
12 F.2d 289, 291 (9th Cir.), *cert. denied*, 510 U.S. 907, 114 S.Ct. 289, 126 L.Ed.2d 238
13 (1993). Admittedly, here, the plaintiff rode on a Seahorse vessel, and Seahorse, therefore,
14 owed her a duty of reasonable care.
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18 The CNMI statute does not concern itself with reasonable care or negligence within
19 the context of injuries aboard a vessel and proximate causation, which the CNMI statute
20 does not reference, but with unfair competition in a manner determined by the CNMI
21 legislature. Localized *ad hoc* determinations do not contribute to the smooth flow of
22 maritime commerce with all vessel operators subject to the same duties and liabilities.
23

24 In conclusion, the Court should follow the lead of the other courts that have dealt
25 with the issue and find for Seahorse on the Second Cause of Action for failure to allege
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27 ⁷ See *Jameson v. Holland America Line-Westours, Inc.*, 2004 WL 1950369, 1 (W.D.Wash.
28 2004) ("not entirely clear that punitive damages are unavailable to a passenger alleging personal
injury under maritime law").

1 any facts that would entitle it to relief. *See Sun Life Assur. Co. of Canada v. Kimble*, 2007
2 WL 3313448, 3 (E.D.Cal. 2007) (claim not cognizable under ERISA), *quoting McGann v.*
3 *Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996) (“A judgment on the pleadings is
4 properly granted when, taking all allegations in the pleading as true, the moving party is
5 entitled to judgment as a matter of law”).
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8 Respectfully submitted this July 30, 2008.

9 RICHARD W. PIERCE LAW OFFICE, LLC

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12 Richard W. Pierce
13 Attorney for Seahorse Inc. Saipan
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